Zulkifli bin Hashim v Officer in Charge of Police District, Barat Daya & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-01–27 OF 2007 AND P-01–28 OF 2007
HELILIAH, MOHD HISHAMUDIN AND RAMLY ALI JJCA
9 DECEMBER 2009

Administrative Law — Exercise of administrative powers — Dismissal from service — Plaintiff terminated from police force for failure to note in diary and to make police report regarding gambling raid — Whether termination in breach of natural justice — Whether court may interfere with decision of disciplinary authority

Administrative Law — Rules of natural justice — Right to be heard — Disciplinary proceedings — Dismissal from police force — Whether plaintiff represented — Whether plaintiff subjected to full hearing in compliance with orderly room procedure — Whether plaintiff understood charges — Whether breach of natural justice

Police — Disciplinary proceedings — Dismissal — Plaintiff terminated from police force for failure to note in diary and to make police report regarding gambling raid — Whether termination in breach of natural justice — Whether only one charge to be proffered where more than one offence committed in course of same transaction — Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 2(7), (46) & 3

Public Servants — Dismissal — Dismissal from police force — Plaintiff terminated from police force for failure to note in diary and to make police report regarding gambling raid — Whether termination in breach of natural justice — Whether only one charge to be proffered where more than one offence committed in course of same transaction — Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 2(7), (46) & 3

The appellant/plaintiff was in a team of police personnel which went to raid suspected gambling activities. No gambling activities were found and hence no physical raid took place. These courses of events triggered the disciplinary proceedings instituted against the plaintiff. Two charges were brought against the plaintiff. First, under reg 2(7) of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations')

for failing to make a note in his diary about the raid. Regulation 2(7) deals with the issue of willfully disobeying any lawful order or neglecting to carry out promptly any such order or perform any duty. Second, under reg 2(46) of the Regulations, for failing to make a police report regarding the said raid. Regulation 2(46) deals with the issue of refusing or neglecting to make any entry in any official record. The plaintiff was acquitted of the second charge but was made to respond to the first charge. The plaintiff was found guilty and was terminated from the Royal Malaysian Police Force. The plaintiff filed a claim seeking a declaration that his termination was invalid. The issue raised on appeal was whether the respondents/defendants acted ultra vires in the conduct of the disciplinary proceedings against the plaintiff and whether the sentences meted out were without authority and in breach of natural justice. The plaintiff claimed that the defendants had not complied with the proviso to reg 3 of the Regulations which provides that where more than one offence is committed in the course of the same transaction only one charge shall be framed in respect of the most serious offence disclosed. It was contended that the second charge was the more serious offence.

Held, dismissing the appeals with costs:

(1) (per **Heliliah JCA**) The court cannot put itself into the shoes of the disciplinary authority to determine the order of priority of the two charges and how they should be framed (see para 9).

(2) (per **Heliliah JCA**) If items 7 and 46 are meant to describe similar or identical acts there would be a degree of redundancy. Moreover there would be a time lapse when the acts prescribed in the two items transpire. It could not therefore be understood that when the plaintiff did not cause any report to be made in his diary which he said was replaced because he said he had lost the original that contemporaneously he had refused or neglected to make any entry. The application of the provision of item 7 is specifically connected to a specific direction of the Inspector General of Police while what is described in item 46 is a general description of neglect or disobedience. It could not be said that such neglect or disobedience transpired 'during' the conduct of the raid. The plaintiff's argument that what was prescribed in item 46 was more serious was without merit. Moreover the disciplinary authority had acquitted the plaintiff of any blame under the second charge (see para 23).

(3) (per **Heliliah JCA**) Bearing in mind art 135(2) of the Federal Constitution ('Constitution'), the plaintiff was subjected to a full hearing in compliance with the orderly room procedure prescribed in the Regulations. He was represented and there was no suggestion he did not understand the charges (see para 29).

(4) (per **Heliliah JCA**) The disciplinary authority had exercised its discretion. It was not incumbent upon the first defendant to provide reasons for arriving at his decision on the punishment to be imposed. The officer who represented the plaintiff during the disciplinary proceedings made a plea with regard to the punishment to be imposed. Yet the punishment of dismissal was still imposed (see para 32).

(5) (per **Mohd Hishamudin JCA**, dissenting) The punishment was grossly disproportionate to the nature of the offence and hence unreasonable. The decision to dismiss was an exercise in absurdity (see paras 55–56).

(6) (per **Mohd Hishamudin JCA**, dissenting) It was wrong for the adjudicating officer to have said that the plaintiff was guilty of insubordination ('kesalahan ingkar perintah'). The charge against the plaintiff was wrongly framed when the words 'ingkar perintah' were used and when para 7 was invoked. He was not guilty of 'wilfully disobeying any lawful order or command'. He had merely neglected to make a record of the 'gambling raid' duty in his note book. Therefore, he was merely guilty of an offence under para 46 (see para 58).

(7) (per **Mohd Hishamudin JCA**, dissenting) The constitutional protection accorded to members of the public services by art 135 of the Constitution is to ensure the impartiality and political neutrality of members of the public services in carrying out their functions. This constitutional protection will be rendered illusory if such officers can be dismissed for trivial offences and the court is powerless to remedy any glaring injustice (see para 68).

[Bahasa Malaysia summary

Perayu/plaintif merupakan ahli pasukan polis yang melakukan serbuan ke atas aktiviti-aktiviti perjudian yang disyaki. Tiada aktiviti perjudian dijumpai dan oleh itu, tiada serbuan dibuat. Kejadian-kejadian ini mencetuskan prosiding disiplin ke atas plaintif. Dua tuduhan dikenakan kepada plaintif. Pertamanya, di bawah peraturan 2(7) Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 ('Peraturan tersebut') kerana gagal mencatitkan dalam diarinya tentang serbuan tersebut. Peraturan 2(7) adalah mengenai isu dengan sengaja melanggar mana-mana perintah sah atau cuai menjalankan dengan segera mana-mana perintah atau melaksanakan mana-mana tanggungjawab. Keduanya, di bawah peraturan 2(46) Peraturan tersebut, kerana gagal membuat laporan polis berkaitan serbuan tersebut. Peraturan 2(46) adalah berkenaan isu enggan atau cuai membuat catatan dalam mana-mana rekod rasmi. Plaintif dilepaskan atas tuduhan kedua tetapi dikehendaki menjawab tuduhan pertama. Plaintif didapati bersalah dan diberhentikan daripada Polis DiRaja Malaysia. Plaintif memfailkan satu tuntutan untuk perisytiharan bahawa pemecatannya tidak sah. Isu yang dibangkitkan dalam rayuan adalah

A sama ada responden-responden/defendan-defendan bertindak ultra vires dalam prosiding tatatertib terhadap plaintif dan sama ada hukuman yang dikenakan adalah tanpa kuasa dan bercanggah dengan keadilan semulajadi. Plaintif mendakwa bahawa defendan-defendan tidak mematuhi proviso peraturan 3 Peraturan tersebut yang memperuntukkan bahawa apabila lebih B daripada satu kesalahan dilakukan dalam satu transaksi yang sama, hanya satu tuduhan mesti dirangka atas tuduhan yang lebih serius. Dihujahkan bahawa tuduhan kedua lebih serius.

Diputuskan, menolak rayuan-rayuan dengan kos:

C (1) (oleh **Heliliah HMR**) Mahkamah tidak boleh bertindak sebagai pihak berkuasa tatatertib untuk menentukan susunan kepentingan kedua-dua tuduhan tersebut dan bagaimana tuduhan-tuduhan tersebut harus dirangka (lihat perenggan 9).

D (2) (oleh **Heliliah HMR**) Jika item (7) dan (46) bertujuan untuk menjelaskan tindakan-tindakan sama atau serupa maka tentunya ada pertindihan. Selanjutnya, akan ada langkauan masa apabila tindakan-tindakan yang digambarkan dalam kedua-dua item tersebut diketahui. Tidak masuk akal apabila plaintif tidak membuat sebarang E laporan dalam diarinya apabila dia menyatakan bahawa telah diganti kerana yang asal telah hilang yang mana dia enggan atau cuai mencatat di dalamnya. Pemakaian peruntukan item (7) khusus berkait dengan arahan khas Ketua Polis Negara dan apa yang dijelaskan dalam item (46) merupakan gambaran am kecuaian atau ketidakpatuhan. Tidak F boleh dikatakan bahawa kecuaian atau ketidakpatuhan tersebut berlaku 'semasa' serbuan tersebut. Hujahan plaintif bahawa apa yang diperuntukkan dalam item (46) lebih serius adalah tidak bermerit. Lagi pula, pihak berkuasa tatatertib telah melepaskan plaintif atas tuduhan kedua (lihat perenggan 23).

G (3) (oleh **Heliliah HMR**) Mengambilkira perkara 135(2) Perlembagaan Persekutuan ('Perlembagaan'), plaintif berhak kepada perbicaraan penuh berikutan prosedur tatatertib yang diperuntukkan dalam Peraturan tersebut. Dia diwakili dan tiada saranan bahawa dia tidak H memahami tuduhan-tuduhannya (lihat perenggan 29).

(4) (oleh **Heliliah HMR**) Pihak berkuasa tatatertib telah melaksanakan budi bicaranya. Tidak perlu bagi defendan pertama untuk memberikan alasan-alasan keputusannya atas hukuman yang dikenakan. Pegawai yang mewakili plaintif semasa prosiding tatatertib telah merayu I terhadap hukuman yang akan dikenakan. Tetapi hukuman pemecatan tetap dijalankan (lihat perenggan 32).

(5) (oleh **Mohd Hishamudin HMR**, menentang) Hukuman tersebut tidak setimpal langsung dengan kesalahan itu dan menjadikannya tidak wajar. Keputusan untuk pemecatan merupakan pelaksanaan yang tidak wajar (lihat perenggan 55–56).

(6) (oleh **Mohd Hishamudin HMR**, menentang) Adalah salah bagi pegawai pengadilan menyatakan bahawa plaintif bersalah atas kesalahan ingkar perintah. Tuduhan terhadap plaintif telah dirangka dengan salah apabila perkataan 'ingkar perintah' digunakan apabila perenggan (7) terpakai. Dia tidak bersalah atas 'dengan sengaja tidak mematuhi mana-mana perintah atau arahan yang sah'. Dia hanya cuai untuk mencatat tentang 'serbuan perjudian' dalam buku notanya. Oleh itu, dia hanyalah bersalah atas kesalahan di bawah perenggan (46) (lihat perenggan 58).

(7) (oleh **Mohd Hishamudin HMR**, menentang) Perlindungan perlembagaan yang diberikan kepada pengkhidmat awam menerusi perkara 135 Perlembagaan adalah untuk menjamin kesaksamaan dan keberkecualian politik pengkhidmat awam dalam menjalankan tugasan mereka. Perlindungan perlembagaan ini akan menjadi dongengan semata-mata jika pegawai-pegawai tersebut boleh dipecat atas kesalahan-kesalahan kecil dan mahkamah tidak berkuasa untuk memperbetulkan ketidakadilan tersebut (lihat perenggan 68).]

Notes

For cases on dismissal, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1197–1226.

For cases on dismissal from police force, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1896–1898.

For cases on dismissal from service, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 36–42.

For cases on right to be heard, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 866–880.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (folld)

Board of Education of the Indian Head School, The v Knight [1990] 1 SCR 653, SC (refd)

Brind & Ors v Secretary of State for the Home Department [1991] 1 All ER 720, HL (refd)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (refd)

Doody v Secretary of State for the Home Department and other appeals [1993] 3 All ER 92, HL (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
R v Secretary of State for the Home Department, ex p Fayed & Anor [1997] 1 All ER 228, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269; [2005] 2 CLJ 108, CA (refd)
Rohana bte Ariffin & Anor v University Sains Malaysia [1989] 1 MLJ 487, HC (refd)
Schmidt & Anor v Secretary of State for Home Affairs [1969] 1 All ER 904, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)

Legislation referred to

Criminal Procedure Code s 165
Emergency (Essential Powers) Ordinance No 2 of 1969
Federal Constitution arts 8, 135(1), (2), 140, 140(2), (6)
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 2, 3, 3(2), 6, Schedule, items 7, 46, 46(a), (b), (c), (d), (e), (f), (g)
Police Act 1967 ss 96, 97
Rules of the Federal Court 1995 r 47(4)
Rules of the High Court 1980 O 15 r 16, O 53, O 53 rr 2, 6

Appeal from: Civil Suit No MT4–21–10 of 1999 (High Court, Penang)

Norizan Ahmad (Athimulan & Co) for the appellants.
Shamsul Bolhassan (Noor Hisham Ismail with him) (Federal Counsel, Attorney General's Chambers) for the respondents.

Heliliah JCA:

[1] Two appeals were brought before us that is Civil Appeal No P-01–27 of 2007 ('appeal A') and No P-01–28 of 2007 ('appeal B'). By consent, it was agreed that we proceed to hear appeal A and our decision thereon will also bind appeal B. The appeals by a majority decision have been dismissed.

[2] The grounds for our decision are given in the context of the facts in appeal A. Both appeals however arise from facts which are in pari materia.

The appellant in appeal A filed a claim seeking a declaration that his termination from the Royal Malaysian Police Force is invalid and has no legal effect and hence the appellant is still a lance corporal in the said force and entitled to all emoluments and benefits which he is entitled to receive.

[3] Broadly, the appeal raises the issues whether the respondents have acted ultra vires in the conduct of certain disciplinary proceedings against the appellant and whether the sentences meted out were without authority and in breach of natural justice. Hereinafter, the appellant and respondents are referred to as the plaintiff and defendants respectively.

[4] Two charges were brought against the plaintiff and they were framed as follows:

Pertuduhan Pertama

> Bahawa anda sebagai L/Kpl di dalam Pasukan Polis Di Raja Malaysia, pada ketika itu bertugas di Balai Polis Bayan Lepas, di dalam Daerah Barat Daya, di dalam Kontijen Pulau Pinang, pada 20 Mac 1996 didapati telah ingkar perintah kerana tidak membuat catitan di dalam buku saku tentang satu serbuan judi di Sungai Ara iaitu berhampiran tokong di tepi sungai pada 7 Mac 1996 antara jam 0300 *hrs* hingga 0430 *hrs* sepertimana kehendak HTKPN A-121 para 2(1), dengan itu telah melakukan satu kesalahan tatatertib di bawah Peraturan 2(7), Peraturan-peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-pegawai Rendah Polis dan Mata-mata), 1970 PU(A) 86 bertarikh 24 Februari 1970 dan PU(A) 56 (Pindaan) yang bertarikh 8 Februari 1984 dan boleh dihukum di bawah peraturan yang sama.

Pertuduhan Kedua

> Bahawa anda sebagai L/Kpl di dalam Pasukan Polis Di Raja Malaysia, pada ketika itu bertugas di Balai Polis Bayan Lepas, di dalam Daerah Barat Daya, di dalam Kontijen Pulau Pinang, didapati tidak membuat laporan polis ke atas satu serbuan judi di Sungai Ara iaitu berhampiran tokong di tepi sungai pada 7 Mac 1996 antara jam 0300 *hrs* hingga 0430 *hrs*, dengan demikian telah melakukan satu kesalahan tatatertib di bawah Peraturan 2(46) Peraturan-peraturan Polis (Kelakuan Dan Tatatertib) (Pegawai-pegawai Rendah Polis dan Mata-mata), 1970, PU(A) 86 bertarikh 24 Februari 1970 dan PU(A) 56 (Pindaan) yang bertarikh 8 Februari 84 dan boleh dihukum di bawah peraturan yang sama.

[5] Counsel for the plaintiff referred us to reg 3 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 (or 'Regulations 1970'). That regulation stipulates:

> 3 Disciplinary charges
>
> (1) A charge shall be framed in accordance with the offence as prescribed in the

Schedule. The charge shall describe the offence briefly and identify the officer with the unlawful act or omission charged.

(2) Where there are two or more distinct offences a separate charge shall be framed in respect of each offence and a separate finding shall be made on each charge:

Provided that where more than one offence is committed in the course of the same transaction only one charge shall be framed in respect of the most serious offence disclosed.

(3) ...

(4) ...

(5) ...

(6) ...

[6] To be noted however is reg 6 which provides the procedure in the conduct of disciplinary proceedings referred to in the marginal notes as the 'Orderly Room Procedure'.

[7] It is in the context of this above mentioned regulation that it is averred that the disciplinary authority in exercising the discretionary power conferred upon it by statute has to act according to the law or more specifically it should confine itself within the scope and ambit of the powers conferred upon it and, if the authority exceeds the limits set by the controlling statute then the act is rendered invalid. This according to counsel for the plaintiff is the reliance upon the doctrine of substantive ultra vires as opposed to procedural ultra vires.

[8] In the context of present appeal the grievance of the plaintiff is that the disciplinary authority has not complied with the terms of the proviso to reg 3 that is 'where more than one offence is committed in the course of the same transaction only one charge shall be framed in respect of the most serious offence disclosed'.

[9] Two matters emanate from the above contention. The first is that the second charge according to counsel should be considered as the more serious. This is considered untenable as the court could not put itself into the shoes of the disciplinary authority to determine the order of priority of the two charges and how they should be framed.

[10] The second more serious matter however is the allegation that the framing of the two charges so worded runs foul of the proviso to reg 3 on the basis that both the offences alleged to have been committed have in effect

been committed in the course of the same transaction. It is the submission therefore that since the offences were committed in the same transaction only one charge, the one that is the most serious disclosed, should have been framed. The matter raises a question of judicial interpretation of the above mentioned proviso.

[11] The events leading to the plaintiff facing disciplinary proceedings are as follows.

[12] On 7 March 1996 approximately between 3am and 4.30am the plaintiff in a team of six other police personnel led by one L/Kpl Idris assisted in a raid in respect of suspected gambling activities at a location identified as Sg Ara. Apparently no gambling activities were found and hence no physical raid took place. According to the statement of the appellant in appeal B (that is in PE7) there were sounds of persons running away. Nevertheless no arrests were made.

[13] This course of events described above triggered the disciplinary proceedings instituted against the plaintiff. The two charges referred to two different provisions which are detailed in the Schedule to Regulations 1970. The Schedule is to be read with reg 2 which provides:

> 2 Any officer who is found guilty of a disciplinary offence as specified in the Schedule hereto shall be liable to any of the punishments as specified in that Schedule.

[14] The first charge refers to item 7 in the Schedule and it states:

> Any junior police officer or constable who —
>
> (7) wilfully disobeys any lawful order or command whether written or otherwise, or without good cause omits or neglects to carry out promptly any such order or command or perform any duty.

[15] The second charge refers to item 46 in the Schedule to 1970 Regulations which stipulates:

> Any junior police officer or constable who —
>
> (46) refuses or neglects to make any entry in any official record, register, book or other document, or alters or erases any entry therein.

[16] It is also to be noted that the Schedule to Regulations 1970 itself stipulates that an officer guilty of an offence against discipline shall be liable to any of the punishments stipulated in paras (a)–(g) specified at the end of the Schedule.

[17] In the course of the disciplinary proceedings conducted, the plaintiff has been acquitted of the second charge but was made to respond to the first charge. Despite that the appeal still raised the issue that the defendants have been acting mechanically without addressing their minds to the limitation or condition or limits circumscribed in the proviso to reg 3(2).

[18] However it is clear that this submission is premised on the opinionated argument that the second charge is more serious than the first charge. It is further to be noted that the first defendant who conducted the disciplinary proceedings has stated in evidence that he is not the person who framed the charges.

[19] The first charge that relates to the wilful disobedience of any lawful order or command is also tied up to the HTKPN A-121 para 2(1). The acronym 'HTKPN' refers to certain permanent directions issued by the Inspector General of Police which are restricted in its circulation but nevertheless the relevant parts were cited during the trial before the High Court. The relevant parts referred to briefly are:

NOTE BOOKS

1 Junior Police Officers and Constables will be required to maintain police note books of the prescribed pattern. The following rules will be observed in the maintenance of note books.

Police Note Books

1.1 All pages will be numbered.

1.2 No leaves will be torn out.

1.3 Entries will be serially numbered.

1.4 Each entry will commence with the date, time and place.

1.5 No blank spaces will be left between entries.

1.6 No erasures or alterations to entries will be made; deletions will be affected by drawing a line through a word or words, and any deletion so made will be initialed.

1.7 No insertions to entries will be made.

1.8 Entries will be made in ink or in indelible pencil.

2 The following occasions will be made the subject of current entries in note books:-

Current entries in police note books.

2.1 Brief details of duty performed.

2.2 Reasons for and time of leaving any set beat or sentry post during a tour of duty.

2.3 A full, exact account of every incident or occurrence of which the police officer concerned is likely to be called upon to give evidence, including statements of accused persons and statement of witnesses, descriptions of persons and property involved, exact distances, and marks, injuries or stained clothing on complainant or accused persons; where statements are entered in note books, the actual words of the speakers will be entered.

2.4 All warnings given to any member of the public.

2.5 Details of all arrests effected, either with or without warrant.

2.6 Details of any suspicious occurrence, whether such occurrence calls for any immediate action or not.

2.7 Details of all summonses received for service, and date, time and place of service.

2.8 Details of any articles found, or any found articles received from other sources for safe custody, and details of disposal of such articles.

2.9 Details of Court exhibits found or received for safe custody, and details of disposal of such exhibits.

2.10 Details of any other incident, occurrence or matter connected with official duties which the police officer concerned considers should be made the subject of an entry.

2.11...

[20] The following provisions under the Police Act 1967 are noted:

20

(1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.

97 The Inspector-General may issue administrative orders, to be called 'Standing Orders', not inconsistent with this Act or of rules or Police Regulations made thereunder, for the general control, direction and information of the Force and of all bodies established or raised for police duties under this Act.

[21] Having perused the related provisions, I revert to the issue raised that the power that has been exercised is ultra vires the Regulations 1970 for the failure to observe the provisions of the proviso to reg 3(2). The words to be considered are 'where more than one offence is committed in the course of the same transaction'. The words 'in the course of' in *Concise Oxford Dictionary* (9th Ed) mean 'during'.

[22] Both counsel for the plaintiff and defendants have focused on the word 'same transaction' where the interpretation has been rendered in the context of the Criminal Procedure Code ('CPC') that is s 165 that states, inter alia:

> 165(1) If in one or series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

[23] It is to be observed that a different approach is prescribed in s 165 of the CPC. In that section, what is permitted is the trial for more than one offence. On the other hand, the proviso to reg 3 of the 1970 Regulations prohibits a combination of charges. However, the issue is whether the offence as framed in the first and second charge in the disciplinary proceedings against the plaintiff could really be said to have been committed in the course of the same transaction. There was a single raid or attempted raid operation in which the plaintiff participated. It would be hardly expected that he could make a written report in his diary while conducting the raid alongside others. On the same note, could it therefore be said that he had refused or neglected to make any entry in any ... book or other document which it is his duty to make. If items 7 and 46 are meant to describe similar or identical acts there would be a degree of redundancy. Moreover there would be a time lapse when the acts prescribed in the two items transpire. It could not therefore be understood that when the plaintiff did not cause any report to be made in his diary which he said was replaced because he said he had lost the original that contemporaneously he had refused or neglected to make any entry. The situation would be different if the proviso had prescribed that the offence is committed 'arising out of the same transaction'. On the facts, I find it simply pedagogical that not lodging the report as required under item 7 of the Schedule was committed 'in the course of the raid'. It is noted that the application of the provision of item 7 was specifically connected to a specific direction of the Inspector General of Police while what is described in item 46 is a general description of neglect or disobedience. Again it cannot be said that such neglect or disobedience transpired 'during' the conduct of the raid. As stated above the argument of counsel for plaintiff is opinionated on the premise that what is prescribed in item 46 is more serious. I find that this contention is without merit. Moreover, the disciplinary authority itself had acquitted the plaintiff of any blame in respect of the second charge.

[24] The next issue concerns the nature of punishment meted out which has described as arbitrary and proportionately excessive. Reference is also made to the reasoning of the Court of Appeal in *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269; [2005] 2 CLJ 108. It has to be observed at the very outset that in *Rekapacific* what was being considered is the scope and application of O 53 r 6 of the Rules of the High

Court 1980 in relation to the question of the discovery of documents. An application for judicial relief pursuant to O 53 r 2 may include a prayer for a declaration. However, the substantive leave sought for is preceded by an application for leave. In the instant appeal before us, what was commenced was not a claim pursuant to O 53 but a writ action for a declaration. The reason for alluding to this is that this is a claim concerning the implementation of a code of conduct and disciplinary measures which in effect requires that the court should be mindful of art 135(1) and (2) of the Federal Constitution since the appellant was a member of the public services. While a declaratory order that is sought pursuant to O 15 r 16 has been interpreted as having the 'widest application ... It does not prescribe any procedure nor is it limited to any specific matter. It applies to all proceedings for declaration when no special procedure is laid down ... ' (per Abdool Cader J (as he then was)), there is still a reminder as stated in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 where Lee Hun Hoe CJ (Borneo) said 'The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion'.

[25] The relief sought by the plaintiff is to strike down the decision of the disciplinary authority as being unreasonable, and excessive. It is also averred that since the plaintiff has been dismissed reasons should have been furnished by the disciplinary in arriving at its decision. Since the decision here is being assailed on unreasonableness the court is also being requested to examine the merits of the decision.

[26] There is an occasion here to refer consider the exact nature of judicial intervention that is sought by the plaintiff in this appeal. The Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 has made certain judicial pronouncements where Edgar Joseph Jr FCJ said at p 191:

> ... It is necessary to compare appellate review jurisdiction with supervisory review jurisdiction.
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> It is clear that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention. As Abbot CJ put it succinctly in *R v Cashiobury Hundred Justices* [1823] 3 Dow & Ry 35; 26 RR 604:
>
> > (Supervisory review) always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by statute.
> >
> > It is true that both appellate review and supervisory review are concerned with the correction of error but, it has often been said, that they are radically different process.

[27] Instead of judicial review pursuant to O 53, through the process of seeking a declaratory order which has been refused, the relief that is sought before us is a hybrid form of the appellate processes combined with judicial review.

[28] In *R Rama Chandran*'s case, Edgar Joseph Jr FCJ also stated in relation to the granting of declarations the following (at p 197):

> Needless to say, if, as appears to be the case this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which *call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors.* A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.
>
> For example where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for so to do would amount to a usurpation of power on the part of the courts.

[29] Bearing in mind art 135(2) of the Federal Constitution, the appellant was subjected to a full hearing and a procedure that is in accord with the orderly room procedure prescribed in the 1970 Regulations. He was represented and there is no suggestion he did not understand the charges.

[30] A comparison has been made with another police personnel Rasidi bin Ahmad ('PW3') who was given a severe reprimand for a similar offence. However it is clear that an explanation was furnished that Rasidi bin Ahmad had to countenance four charges with varying degrees of seriousness one of which was the failure to declare assets. A sentence of dismissal was imposed upon him for the more serious offence and since the offence of not making an entry in the police note book was one of four charges he was given a severe reprimand for the latter charge.

[31] It has not been suggested, other than the allegation that since Rasidi bin Ahmad has been given a severe reprimand and the plaintiff should therefore he similarly imposed the same punishment, that the plaintiff did not comprehend the charge against him. As stated, the 1970 Regulations, reg 2 states:

> Any officer who is found guilty of a disciplinary offence as specified in the Schedule shall be liable to any of the punishments as specified in that Schedule.

[32] The disciplinary authority in this appeal has exercised its discretion. The learned trial judge has stated that it is not incumbent upon the first defendant to provide reasons for arriving at his decision on the punishment to be imposed. We agree for the following reason. It is noted that the officer who represented the plaintiff during the conduct of the disciplinary proceedings made a plea with regard to the punishment to be imposed. Yet the punishment of dismissal was still imposed. The alleged transgression of art 8 of the Federal Constitution is consequently found to be unacceptable. Rasidi bin Ahmad received different treatment as the charges against him were different.

[33] It is pertinent to note that not all of the authorities cited by counsel for the appellant are relevant. *Rohana bte Ariffin & Anor v University Sains Malaysia* [1989] 1 MLJ 487 cited by counsel was a case where the applicant in applying for an order for certiorari was a case where the applicant was denied fair representation. In addition the sentence imposed was enhanced when in effect the disciplinary authority acted in excess of authority. Cases such as *R v Secretary of State for the Home Department, ex p Fayed & Anor* [1997] 1 All ER 228; *Doody v Secretary of State for the Home Department and other appeals* [1993] 3 All ER 92; *Schmidt & Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 relate to the exercise of discretion by the Secretary of State in England in circumstances which are vastly different from this appeal which relates to the exercise of the discretion of the disciplinary authority. Here the disciplinary authority has considered that there has been misconduct deserving the punishment of dismissal. In *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29, this court has adopted the view expressed by L' Heureux-Dubie J on behalf of the majority of the Supreme Court of Canada in *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.

[34] If the 1970 Regulations has fallen short of the requirements of art 135(2) it is not for this court to rewrite the subsidiary legislation.

[35] Under the circumstances, both the appeals are dismissed with costs and the orders of the High Court affirmed.

Mohd Hishamudin JCA:

[36] These two appeals, namely, Civil Appeal No P-01–27 of 2007 and

Civil Appeal No P-01–28 of 2007 are related and heard together before this court. They originate from two High Court of Penang civil suits, namely, Civil Suit No MT4–21–10 of 1999 and Civil Suit No MT4–21–11 of 1999. These two High Court cases had been heard together by the High Court of Penang.

[37] I have allowed the appeals with costs. I shall now give my grounds.

[38] At the High Court, the plaintiffs' writ actions against the defendants were for a declaration that their dismissal from the Royal Malaysia Police Force was invalid and a nullity; and that the plaintiffs are still officers of the Royal Malaysian Police Force holding the rank of lance corporal and are entitled to receive salary and benefits as such officers of the force.

[39] There is also an ancillary prayer for an inquiry to be conducted by the registrar to determine the arrears in salary, emoluments and other benefits that the plaintiffs are entitled to in the event that the court were to grant the above declaration.

[40] The plaintiffs' actions were dismissed with costs by the High Court; and they are now the appellants before this court.

[41] The appellants/plaintiffs were police officers attached to the Bayan Lepas (Barat Daya), Penang, Police Station. They held the rank of lance corporal. The first appellant (Zulkifli) joined the police force in 1981, whilst the second appellant (Zoki) joined in 1986.

[42] On 7 March 1996, the appellants and several other police officers were assigned to carry out a raid on an allegedly illegal gambling activity at a temple (tokong) at a locality called Sg Ara, Penang. On arrival at the specified premises the raiding party, however, saw that there was no one there. The police party therefore returned to base. In other words, no raid on alleged illegal gamblers took place.

[43] Under Standing Order 2, para 2.1 of the Inspector General Standing Order ('IGPSO'), the appellants were required to make a brief record of that particular duty (the carrying out of the intended raid on illegal gamblers at the particular premises at Sg Ara) in their pocket diary (also called police note book), just like what they would have done for any other duties that they had carried out. Standing Order 2, para 2.1, provides:

> Current entries in police note books
>
> 2 The following occasions will be made the subject of current entries in note books:

2.1 Brief details of duty performed.

[44] Paragraph 2.1 of the Standing Order 2 would be better appreciated if I were to also refer to the Standing Order 1 of the IGPSO. Standing Order 1 reads:

Police Note Books

1 Junior Police Officers and Constables will be required to maintain police note books of prescribed pattern. The following rules will be observed in the maintenance of note books.

1.1 All pages will be numbered.

1.2 No leaves will be torn out.

1.3 Entries will be serially numbered.

1.4 Each entry will commence with the date, time and place.

1.5 No blank spaces will be left between entries.

1.6 No erasures or alterations to entries will be made; deletions will be affected by drawing a line through a word or words, and any deletion so made will be initialed.

1.7 No insertions to entries will be made.

1.8 Entries will be made in ink or indelible pencil.

[45] In the present case, however, both appellants failed to record that duty that they had carried out in their pocket diary. For this failure, the police department took disciplinary action against them under reg 2 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations') read with para 7 of the Schedule to the Regulations. The charge against each of them reads:

Bahawa anda sebagai L/Kpl di dalam Pasukan Polis DiRaja Malaysia, pada ketika itu bertugas di Balai Polis Bayan Lepas, di dalam Daerah Barat day, di dalam Kontijen Pulau Pinang, pada 20 Mac 1996 didapati telah ingkar perintah kerana tidak membuat catitan di dalam buku saku tentang satu serbuan judi di Sungai Ara iaitu berhampiran Tokong di tepi sungai pada 7 Mac 1996 antara jam 0300 *hrs* hingga 0430 *hrs* sepertimana kehendak HTKPN A-121 para 2(1), dengan itu telah melakukan satu kesalahan tatatertib di bawah Peraturan 2(7), Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata), 1970 PU(A) 86 (Pindaan) yang bertarikh 8 Februari 1984 dan boleh dihukum di bawah peraturan yang sama.

(the reference in the above charge to 'di bawah Peraturan 2(7)' is obviously an error as there is no such provision: reg 2 does not have any sub-reg. There is a second charge against the appellants — a charge of failing to lodge a

police report pertaining to the raid; but the appellants at the end of the disciplinary proceeding were exonerated of this charge).

[46] Regulation 2 of the Regulations provides:

Disciplinary offences

2 Any officer who is found guilty of a disciplinary offence as specified in the Schedule hereto shall be liable to any of the punishments as specified in that Schedule.

[47] Paragraph 7 of the Schedule provides:

Any junior police officer or constable who —

(7) willfully disobey any lawful order or command, whether written or otherwise, or without good cause omits or neglects to carry out promptly any such order or command or perform any duty;

… shall be guilty of an offence against discipline and shall be liable to any of the following punishments:

(a) Dismissal;

(b) Reduction in rank

(c) Deferment in increment

(d) Stoppage of increment

(e) Fine not exceeding one month's pay;

(f) Severe Reprimand;

(g) Reprimand;

(h) Extra guard duty for a time not exceeding four hours a day for a period not exceeding five days;

(i) Fatigue duty for a time not exceeding four hours a day with ten minutes rest after each hour of the fatigue duty for a period not exceeding five days;

(j) Extra drill for a time not exceeding two hours a day with ten minutes rest after each hour of the extra drill for a period not exceeding five days

Provided that the time of rest referred to in sub-paragraph (i) and (j) are not counted as punishment time.

[48] The above Regulations are made by the Director of Operations in 1969 (in the exercise of his powers under the Emergency (Essential Powers) Ordinance No 2 of 1969) pursuant to s 96 of the Police Act 1967 following the declaration of Emergency by the Yang di-Pertuan Agong in the aftermath

of the May 13 incident (in a 'non-emergency' situation the Regulations would be made by the Yang di-Pertuan Agong). Section 96 of the Police Act reads:

96 Police Regulations

(1) The Yang di-Pertuan Agong may make regulations to be called 'Police Regulations' not inconsistent with the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing, the Yang di-Pertuan Agong may make Police Regulations, relating to all or any of the following matters:

(a) Promotions and reductions in rank;

(b) Discipline, including the definition of disciplinary offences, disciplinary procedure and the regulations and carrying out of punishment;

(c) …

[49] In principle, the powers, duties and responsibilities pertaining to the discipline of members of the police force are vested in the Police Force Commission established under art 140 of the Federal Constitution. Clause (1) of this article reads:

140 Police Force Commission

(1) There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the police force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, emplacement, on the permanent or pensionable establishment, promotion, transfer and exercise of disciplinary control over members of the police force.

Provided that Parliament may by law provide for the exercise of such disciplinary control over all or any of the members of the police force in such manner and by such authority as may be provided in that law and in that event, if the authority is other than the Commission, the disciplinary control exercisable by such authority shall not be exercised by the Commission; and no provision of such law shall be invalid on the ground of inconsistency with any provision of this Part.

[50] Clause (6) of art 140 provides:

(6) The Police Force Commission may provide for all or any of the following matters:

(b) the duties and responsibilities of the several members of the Commission, including the delegation to any member of the Commission or the police

force or board of officers of such force or a committee consisting of members of the Commission and of the force of its powers or duties;

[51] In the present case, the disciplinary proceeding, as is usually the case, was not held before the Police Force Commission but before an 'adjudicating authority' in accordance with the orderly room procedure as prescribed by the provisions of the Regulations. The adjudicating authority was one Assistant Commissioner Dato' Abdul Aziz bin Nawi (the police officer in charge of the Police District of Barat Daya at the material time) who was delegated with the powers of the Police Force Commission pertaining to disciplinary matters in respect of junior police officers pursuant to cl 2 of art 140 of the Police Commission.

[52] At the conclusion of the proceeding before the adjudicating authority, the appellants were found guilty of the charge and were punished with an order of dismissal.

[53] Aggrieved by the decision of the adjudicating authority, the appellants commenced writ actions against the respondents alleging, amongst others, the unreasonableness of the adjudicating authority's decision to impose the punishment of dismissal on them. They contend that the punishment, considering the nature of their offence, was too severe, disproportionate to the offence and unreasonable.

[54] Paragraph 13 of the statement of claim of the appellants reads:

(1.3)Plaintiff mendakwa hukuman buang kerja adalah 'proportionally excessive'.

[55] In my judgment, I find merit in the appellants' submission that the punishment is grossly disproportionate to the nature of the offence and hence unreasonable. I so hold for the following reasons. Firstly, the offence is only that they failed to record the 'gambling raid' duty (which raid, in fact, never took place because the raiding party found no-one at the targeted premises) in their police note book. To my mind, this is relatively a very minor offence. Secondly, there is no evidence that they were guilty of any disciplinary offence in the past. Thirdly, there is no evidence that their failure to make the entry in their note book had resulted in some adverse consequences for the police department (for example, their failure to make the entry about the illegal gambling 'raid' duty in their note book had contributed to the police department being unable to initiate a prosecution for the offence of illegal gambling). Fourthly, at the inquiry, they readily admitted committing the offence of failing to make the record about the 'raid' duty (but they explained that they did not record about the 'raid' in their note book because the

intended raid, as it turned out, did not take place). Fifthly, they had been long serving officers in the police force (since 1981 for the first appellant; and since 1986 for the second appellant), achieving the rank of lance corporal. Finally, a punishment of dismissal means a loss of livelihood and reputation. Their family would also suffer.

[56] This being the case, this court must intervene so as to set aside the punishment. The punishment, to my mind, is out of proportion to the nature of the offence and to the circumstances of the case. The decision to dismiss is an exercise in absurdity. It is decision that shocked the conscience of the court. It is unconscionable for this court just to standby without extending a helping hand in the face of this injustice that has inflicted two members of the public services, particularly, when it involves their livelihood and reputation as well as their constitutional rights as members of the public services. In the House of Lords case of *Brind & Ors v Secretary of State for the Home Department* [1991] 1 All ER 720, Lord Ackner said (at p 735):

> Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the '*Wednesbury* unreasonable' epithet. It is, ex-hypothesi, a decision which no reasonable minister could make.

[57] It is my observation that, at the trial before the High Court judge, Assistant Commissioner Dato' Abdul Aziz bin Nawi (the adjudicating authority at the inquiry), in his evidence, had failed to furnish any explanation at all as to why he had imposed on the appellants the highest punishment possible: that of dismissal. He merely said:

> Saya sesungguhnya menegaskan bahawa hukuman buang kerja itu adalah setimpal dengan perlanggaran tatatertib yang telah dilakukan oleh plaintif kerana kesalahan ingkar perintah di bawah Peraturan 2(7) Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) Pegawai-Pegawai Rendah Polis dan Mata-mata), 1970 (PU (A) 86/1970) adalah satu kesalahan yang serious dan wajar dikenakan hukuman buang kerja. Hukuman buang kerja yang dikenakan terhadap plaintif bukanlah satu hukuman yang keterlaluan. Saya telah membuat pertimbangan yang sebaik-baiknya dan seadil-adilnya sebelum mencapai keputusan untuk menjatuhkan hukuman buang kerja terhadap plaintif.

[58] I must remark here that in the first place, it was wrong for the adjudicating officer to have said that the appellants were guilty of insubordination ('kesalahan ingkar perintah'). The truth is that the charge against the appellants was wrongly framed when the words:

> *ingkar perintah*

were used and when para 7 of the Schedule was invoked. The charge as drafted gives a wrong impression to any person reading the charge, who is not

familiar with the facts of the case and the law — the wrong impression that the appellants were guilty of an act of insubordination, in the sense of disobeying an order of a superior. But they were not guilty of such an offence. They were not guilty of:

> wilfully disobeys any lawful order or command

(to use the exact words as found in para 7 of the Schedule). They had merely neglected to make a record of the 'gambling raid' duty in their note book. Therefore, they were merely guilty of an offence under para 46 of the Schedule that reads:

> (46) refuses or neglects to make any entry in any official record, register, book or other document which it is his duty to make;

[59] To record in their note book about the 'gambling raid' is a duty that they must perform — a duty imposed on them by Standing Order 2, para 2.1, of the IGPSO; and to neglect to make such a record in the note book is to neglect to carry out a duty ('neglects to make any entry in any official... book … which it is his duty to make'). Clearly, the police note book is an 'official book' for the purpose of para 46 of the Schedule. But such neglect to carry out that duty is clearly not insubordination. It is merely a neglect to carry out a duty. It is a petty offence. The provisions of the IGPSO are not commands of a police officer to his subordinates: they are merely regulations. The IGPSO is a delegated legislation exercisable by the Inspector General of Police pursuant to s 97 of the Police Act 1967. In the context of the present case, the appellants would have been guilty of insubordination if, for example, they had refused to carry out the 'gambling raid' duty; for, that was an order of a superior. But that is not the case here. It is unfortunate in the present case that the appellants did not raise this issue about the fundamental flaw in the charge in their pleadings.

[60] Therefore, it is wrong for the adjudicating officer to say to the court at the trial that the offence of failing to record in the note book about the raid duty is an act of insubordination ('kesalahan ingkar perintah'); and it is absurd for him to say that it was a serious offence ('satu kesalahan yang serius'), and thereafter to impose the harsh punishment of dismissal. For this officer to assert that it was a serious offence without providing any valid basis is, in my opinion, nothing more but a desperate and feeble attempt on his part to justify an irrational punishment, to justify an act that is clearly arbitrary on his part.

[61] In the present case, it is also disquieting to note that although the question as to the reasonableness or excessiveness of the punishment was

pleaded in the statement of claim and was also raised in the written submissions of learned counsel for the plaintiffs at the trial, yet, the grounds of judgment of the learned High Court judge did not deal with this important issue at all.

[62] On my part, however, I accept that as a general rule a court of law cannot question as to whether or not a particular punishment imposed by an administrative authority, in the exercise of its disciplinary function, is appropriate or otherwise, and to substitute that punishment with another punishment (*Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405). That would amount to a usurpation of the function of the executive. However, there is an exception to this general rule: there is the well known principle known as the *Wednesbury* principle (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). In the landmark case of *Wednesbury Corporation* Lord Greene said that when a statute gave a discretion to an administrator to make a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or other of the following conditions were satisfied — namely, the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. Applying this principle to the fact of the present case, the test, therefore, is:

> Was the punishment of dismissal imposed by the adjudicating authority a punishment which a reasonable authority could have imposed?

[63] In my judgment, in the context of the facts of the present case, considering the nature of the offence and the mitigating factors, the answer must without doubt be in the negative.

[64] There is authority for the application of the reasonableness principle in relation to the exercise of powers by a disciplinary authority over members of the public services. It is the Court of Appeal case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771. In this case, one Tan, a senior assistant of a primary school was charged in court for misappropriating a sum of RM3,179 from the school. He, subsequently, made good the sum. He was convicted by the sessions court and sentenced to six months' imprisonment. On appeal to the High Court, the conviction was substituted by a finding of guilt and the sentence of imprisonment was set aside. Instead, the court made an order of binding over for good behavior for a period of three years. Disciplinary proceedings were then instituted. The disciplinary authority decided that he be dismissed from service. Tan then filed a writ action seeking the usual declarations that his dismissal be declared void and invalid; that arrears of salary be

determined, etc. The action was dismissed by the High Court. On appeal to the Court of Appeal, it was held (by a majority judgment, allowing the appeal) that the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably; and that if it imposed a punishment that was disproportionate to the misconduct, its decision on the punishment was liable to be quashed or set aside. The Court of Appeal then by a majority substituted the order of dismissal in effect with an order that the senior assistant of the primary school be reduced in rank and salary to those of an ordinary teacher. Gopal Sri Ram JCA (as he then was), in delivering the majority judgment, said:

> If it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, then its decision, to this extent, becomes liable to be quashed or set aside. As to whether our courts must, in all such cases, direct reinstatement or may grant some other appropriate relief in an action for declaratory relief, by, for example, imposing a lesser punishment, is a question that I shall return to later.

[65] At a later part of the judgment, His Lordship said:

> Severity of punishment
>
> The next question I need to address is whether the order of dismissal made by the first respondent is unduly severe in all the circumstances of the case. In order to answer that question, it is necessary for me to re-examine some of the salient facts.
>
> It will be recalled that the department did not recommend dismissal. It suggested that the appellant be reduced in rank. But the first respondent did not accept that recommendation. It acted purely upon the basis of the binding over order made by the Muar High Court. The first respondent's letter of 8 May 1990, by which it dismissed the appellant does not reveal that it took any other factor into account. This is precisely what the law says should not be done. Of course, the appellant had a criminal charge proved against him. But all that did, as I have earlier said, was to deprive the appellant of the right of making any representation upon the issue of misconduct and punishment.
>
> In my judgment, the first respondent ought to have considered the several factors set out by the learned judicial commissioner in his judgment and the recommendation made by the department. Had it done so, it may well have come to the conclusion that dismissal was too severe a punishment to impose upon the appellant and that a lesser punishment ought to be imposed.
>
> Earlier in this judgment, I spoke of exceptional cases of master and servant in the context of the public service. The present appeal is one such case.
>
> In a case like the present, this court is, for the reasons already given sufficiently empowered to come to its own conclusion on the merits on the case. Taking into account all the relevant facts of the case, including the extenuating factors alluded to by the Muar High Court, I am inclined to agree with the submission of counsel

that the order of dismissal was too severe a punishment to impose upon the appellant. In the peculiar circumstances of this case, some lesser punishment ought to have been imposed.

[66] It is true that the majority judgment of the Court of Appeal makes no specific reference to the *Wednesbury* reasonableness principle. However, it is clear from the above passages that I have quoted that the majority judgment of the Court of Appeal found the punishment imposed in that case as being unreasonable.

[67] The above decision of the Court of Appeal, to my mind, is in consonance with the spirit of art 135 of the Federal Constitution which protects the security of tenure of members of the public services. This article provides:

PART X

PUBLIC SERVICES

Restriction on dismissal and reduction in rank

(1) No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank:

Provided that in its application to members of the services mentioned in paragraph (g) of Clause (1) of Article 132 this Clause shall not apply to any law which the legislature of any State, other than Penang and Malacca, may make to provide that all powers and functions of a Public Service Commission of such State, other than the power of first appointment to the permanent or pensionable establishment, be exercised by a Board appointed by the Ruler of such State:

And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this clause shall not apply to the following cases:

a where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

A b where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or

c where the Yang di-Pertuan Agong, or, in the case of a member of the public B service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or

d where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or C where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

D Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or E unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

(3) No member of any of the service mentioned in paragraph (c), (f) or (g) of F Clause (1) of Article 132 shall, without the concurrence of the Judicial and Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicial function conferred on him by law.

G **[68]** The appellants, being police officers and therefore subject to the jurisdiction of the Police Force Commission, are members of the public services. The constitutional protection accorded to the members of the public services by art 135 of the Constitution is to ensure the impartiality and political neutrality of members of the public services in carrying out their H functions; meaning to ensure that they would carry out their duty fearlessly faithfully (but lawfully, obeying only lawful orders and directives) regardless of the political colour of the government of the day without fear of reprisal. This constitutional protection, however, will be rendered illusory if such officers can be dismissed for trivial offences and the court is powerless to I remedy the glaring injustice. For the constitutional protection to be effective and meaningful, the court must be empowered to question any decision of the disciplinary authority that it considers to be unreasonable and to remedy any injustice occasioned by such unreasonable decision by applying established administrative and constitutional law principles.

[69] In this judgment I am, however, mindful of the decision of Federal Court in *Ng Hock Cheng*, a case cited by learned federal counsel acting for the respondents, who submitted that the High Court has no power to question the reasonableness of the punishment imposed on the appellants. In this case cited by learned federal counsel, the appellant was a chief store keeper at the detention camp at Kamunting, Taiping. He incurred heavy debts and the indebtedness was more than six times his monthly salary. Disciplinary proceeding was instituted against him under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. At the disciplinary proceeding, representations were made on his behalf that he had served the government faithfully for 28 years; that the indebtedness was due to helping his father; and that he otherwise was of good character. The Public Services Commission, after considering the appellant's representations, dismissed him from service. He commenced a writ action seeking a declaration that his dismissal as a chief store keeper of the prison department was void; and an enquiry be held to determine the arrears of salary, etc. His action was dismissed by the High Court. His appeal to the Court of Appeal was also dismissed. The appellant applied for leave to appeal to the Federal Court. The court granted leave to appeal, but limited to only one question of law (vide r 47(4) of Rules of the Federal Court 1995). The question of law was as follows:

> Sama ada telah dibuang kerja dengan sah dan sama ada mahkamah mempunyai kuasa untuk menyentuh hukuman yang telah diberikan oleh Lembaga Tatatertib berkenaan.

[70] On the appellant's contention in that case, the Federal Court said:

> The main contention of the appeal before us was therefore that he should be meted out a lesser punishment than the order of dismissal made by the disciplinary authority in question.

[71] The Federal Court then went on to stress what it considered as the real issue before it in the following terms:

> It should be emphasised in order to avoid confusion, that the said question for which leave to appeal to this court was granted was in truth as to whether the High Court had the jurisdiction or power to vary any penalty imposed by the Public Services Commission as contradistinguished from another related but no longer important question or the purpose of the instant appeal of whether the appellant had or had not been guilty of any misconduct which could render him liable in the first place to any penalty or punishment as provided by the said general orders.

[72] The Federal Court answered the above question in the negative.

[73] In my judgment, *Ng Hock Cheng* can be distinguished from the present case. In *Ng Hock Cheng* the issue was only whether the court can question the appropriateness of the nature of punishment imposed on the public officer in question and to substitute the punishment imposed by the disciplinary authority with a lesser punishment. The question as to whether or not the punishment of dismissal was unreasonable or excessively severe on the facts of the case was never an issue in that case; whereas reasonableness or excessive severity is the very issue in the present case. And very importantly in the present case I do not intend to substitute the punishment of dismissal with another form punishment; and, indeed, nor are the appellants asking me to do so.

[74] It is, however, to be noted that the Federal Court in *Ng Hock Cheng* purports to overrule partially *Tan Tek Seng*, that is to say, to overrule that aspect of the Court of Appeal's judgment referred to by the Federal Court as the 'narrow point'. For the Federal Court said:

> Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point.

[75] By 'narrow point' the Federal Court meant the issue as to whether the High Court has the jurisdiction or power to vary any penalty imposed by the Public Services Commission.

[76] It is very pertinent to observe that the Federal Court, in purporting to overrule *Tan Tek Seng* rather strangely, only concerned itself on the so-called 'narrow point' and that in its entire judgment the Federal Court never touched at all on the more important aspect of the judgment of the Court of Appeal (which I have reproduced above in this judgment) that dealt with the substantive issue as to the unreasonableness (or the excessive severity) of the punishment in that case, and where the Court of Appeal had ruled that the court has the power or jurisdiction to question the legality of a punishment and to set it aside if the court were of the view that the punishment in question was in the circumstances of the case too severe as to be unreasonable (and, indeed, the Court of Appeal in *Tan Tek Seng* was of the view that the punishment in that case was too severe and, hence, unlawful). In my view, the approach taken by the Federal Court is, with the greatest respect, perplexing. To my mind, the 'narrow point' issue is merely a consequential issue in *Tan Tek Seng*. Indeed, with respect, I would venture to say that the Federal Court,

without first dealing with the substantive issue of reasonableness or severity of punishment that was raised by the Court of Appeal in *Tan Tek Seng*, its criticism of the Court of Appeal's judgment, by merely touching on the 'narrow point' issue, which is only a consequential issue, appears to me to be somewhat (again I am saying it with all humility) incomprehensible.

[77] Now, it is also my view that since reasonableness of the punishment is not an issue in *Ng Hock Cheng*, whereas reasonableness is an issue in *Tan Tek Seng* coupled with the fact that the Federal Court (in *Ng Hock Cheng)* in criticising the Court of Appeal's majority judgment (in *Tan Tek Seng*), had omitted to deal with the issue of unreasonableness or the excessive severity of the sentence in *Tan Teck Seng*, what was said by the Federal Court on the 'narrow point' in relation to *Tan Tek Seng*, therefore, at best, must be taken to be only an obiter dicta.

[78] Be that as it may, overruled or otherwise, obiter or otherwise, it is interesting to note that the judgment of the Court of Appeal in *Tan Tek Seng* was cited with approval in the recent Federal Court case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631, where the court said:

> 14 When art 5(1) is read prismatically and in the light of art 8(1), the concepts of 'life' and 'personal liberty' housed in the former are found to contain in them other rights. Thus, 'life' means more than mere animal existence and includes such rights as livelihood and the quality of life (see *Tan Tek Seng*'s case).

[79] Although in the present case I have ruled that the punishment imposed by the adjudicating authority is unreasonable and hence unlawful, and I am minded to grant the declarations sought by the appellants as well as to set aside the order of dismissal, nonetheless, I do not intend to substitute the punishment of dismissal as imposed by the adjudicating authority with a another form punishment. In my judgment a more appropriate course of action for me to take (apart from granting the declaration and ordering an inquiry on the assessment of arrears of salary, emoluments, etc sought) is to set aside the order of the adjudicating authority on the punishment and to make an order that the administrative case of the appellants be remitted back to the adjudicating authority for it to consider and to impose an appropriate punishment, which shall be a punishment that is other than the punishment

of dismissal. The inquiry as to arrears of salary, emoluments, etc is to be carried out by the registrar only after the appropriate punishment has been imposed by the adjudicating authority.

Appeals dismissed with costs.

Reported by Kanesh Sundrum